No. 99-847

IN THE

Supreme Court of the United States

ALBANY INSURANCE COMPANY,

Petitioner,

v.

BANCO SANTANDER MEXICANO, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Parties to the Proceeding (Rule 14.1(b))

The petition accurately lists the original parties to the proceedings below, but does not accurately list the parties as they exist today. Banco Mexicano, S.A. no longer exists. Banco Santander Mexicano, S.A., named as respondent in the caption of this brief in opposition, is the successor by corporate merger to Banco Mexicano, S.A.

Corporate Disclosure Statement (Rule 29.6)

Respondent Banco Santander Mexicano, S.A. is a subsidiary of Banco Santander Grupo, S.A., a publicly-owned holding and banking company domiciled in Spain. Banco Santander Mexicano, S.A. has no other publicly-owned corporate parents, and has no publicly-owned subsidiaries or affiliates. As noted in the foregoing Rule 14.1(b) statement, the original named respondent in this proceeding, Banco Mexicano, S.A., has been merged out of existence, and Banco Santander Mexicano, S.A. is its successor.

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STATEMENT OF THE CASE

Respondent Banco Santander Mexicano, S.A. ("BancoMex") submits this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit of petitioner Albany Insurance Company ("Albany"). Albany seeks the writ to review a judgment affirming the dismissal of its complaint on the basis of contractual international forum selection clauses. Those clauses commit disputes relating to the subject matter of this case to the courts of Mexico. The lower courts correctly held the forum clauses applicable to the parties and claims asserted in this case, correctly decided that their enforcement would be neither "unreasonable" nor "unjust," and correctly applied them in dismissing Albany's complaint. Their decisions comport with well settled rules of contract interpretation, and properly reflect the deference owed to such clauses, a deference mandated by this Court in *M/S Bremen v. Zapata Off Shore Co.*, 407 U.S. 1, 17-18 (1972), and no longer subject to any serious dispute.

While Albany seeks to avoid the application of these settled principles of contract law and civil procedure to its complaint, its petition neither specifies nor even alludes to *any* conflict (much less an important one) between the decision of the court of appeals here and any decision of this Court, or between decisions of the circuit courts, that requires this Court's intervention. Similarly, the petition raises no serious and substantial question of federal law, or one relating to the administration of justice, that would mandate issuance of the writ. The petition should be denied.

A. The Facts.

Albany is a New York property and casualty insurer. BancoMex is a Mexican bank. A wholly-owned subsidiary of BancoMex, Almacenadora Somex, S.A. ("Somex"), operated coffee bean storage and warehousing facilities in Mexico. Albany insured Coffee Trade Services, Inc., Contitrade Services Corporation, and

Continental Grain Co. (collectively, the "Insureds"), coffee traders or brokers that deposited coffee in the Somex warehouses in Mexico. Alleging that it had paid its Insureds' claims for missing or damaged coffee in the Somex warehouses (Albany was thus subrogated to the Insureds' rights), Albany sought to recover those losses from BancoMex, Somex's parent. (App. 12a)

On the receipt of coffee in its warehouses, Somex issued negotiable warehouse instruments ("Warehouse Receipts"). Each Warehouse Receipt consists of (1) a receipt endorsed with the words "note for loan" ("bono de prendo" in the Spanish), (2) a document entitled "Provisions Governing the Use of Notes for Loans Against Goods in Warehouse," and (3) a document entitled "General Conditions of the Warehouse Receipt." By issuing a Warehouse Receipt, Somex warranted that it would have a stipulated quantity of green coffee beans in its warehouse when demand was made. (App. 12a-13a) The three parts of a Warehouse Receipt are physically attached to each other, are issued and executed simultaneously, refer to each other, and must be presented together to release stored coffee. (App. 15a-16a)

Somex issued the Warehouse Receipts that underlie *this* dispute to Cafetalera Zardain Hermanos, S.A. de C.V. ("Zardain"), but in favor of Albany's Insureds, for whom Zardain acted as agent. Accordingly, the Insureds' rights in the coffee held in Somex's warehouses derive from the Warehouse Receipts. (App. 2a-3a) Each Warehouse Receipt contains a forum selection clause providing, in Spanish, that: "[i]n order to resolve any matter related to this instrument, the interested parties agree to submit to the tribunals of the City of Mexico, renouncing any other forum that corresponds or that may correspond to them." (App. 3a)

Albany alleged in this case that its Insureds demanded delivery of coffee, and that Somex breached its contract obligations by failing to deliver the coffee or by making short deliveries or delivering damaged coffee. Albany asserted a contract claim against

BancoMex arising from the Somex/Insureds contract; tort claims against BancoMex for negligence, conversion, fraud, civil conspiracy, and tortious interference with contract (on the same facts alleged to give rise to the contract claim); and claims that BancoMex is liable for the obligations of its subsidiary Somex under theories of *alter ego* liability and veil piercing liability. (App. 20a-22a) All of the claims arise under state or common law.

B. Course of Proceedings Below.

Albany filed its complaint in the district court on December 17, 1996. It invoked the alienage jurisdiction of the district court under 28 U.S.C. § 1332(a)(2). BancoMex filed an answer and affirmative defenses on February 20, 1997, including an affirmative defense of improper venue in the Southern Judicial District of New York. Albany served certain discovery requests, and BancoMex served responses and objections. While contending that BancoMex's responses were inadequate, Albany failed to move to compel discovery.

By notice of motion dated July 14, 1997, BancoMex moved to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(3) and 12(h)(1), for improper venue based on the forum selection clauses. Albany opposed the motion with its counsel's affidavit accompanied by a memorandum of law, but did not request an evidentiary hearing or seek any relief to secure or place before the district court *evidence* that would contradict BancoMex's factual arguments. Similarly, it did not move to strike matter submitted by Albany that it deemed objectionable. By memorandum opinion and order dated October 14, 1998, the district court granted the motion to dismiss. The court entered judgment on October 21, 1998, and Albany filed a timely notice of appeal from that judgment on November 16, 1998. The decision of the district court is not officially reported, but is found in *Westlaw* at 1998 WL 730337 (S.D.N.Y. October 19, 1998)(Batts, D.J.). (App. 11a)

By summary order dated July 2, 1999, the United States Court of Appeals for the Second Circuit affirmed the district court's judgment. The summary order is not reported, but is referred to at 182 F.3d 898 (2d Cir. 1999)(table)(Calabresi, C.J., presiding). (App. 1a) Albany timely moved for rehearing *en banc* before the court of appeals. By order dated August 18, 1999, the court of appeals denied that motion without dissent. (App. 26a) Albany filed its petition for a writ of certiorari on November 16, 1999. This Court has jurisdiction over the petition pursuant to 28 U.S.C. § 1254(1).

C. The Memorandum Opinion and Order of the District Court.

The district court divided its analysis of Albany's arguments against enforcement of the forum selection clauses in two parts. *First*, the court considered whether the Warehouse Receipts ("Certificados") and corresponding loan notes ("Bonos") issued by Somex constituted an integrated contract that was binding on Albany. (App. 15a-16a) New York law holds that documents executed contemporaneously are deemed part of the same transaction. The court noted that both the Bonos and the Certificados had not only been issued and executed together, but also had to be surrendered together in order to redeem the coffee identified therein. Moreover, each Certificado bore the same serial number as its corresponding Bono, and both documents expressly referred to one another. (*id.*)

Accordingly, the district court found that the Certificados and the Bonos were parts of an integrated contract, so that the forum selection clauses appearing in the latter were applicable to a suit upon the former. (App. 16a) Similarly, Albany, which as a subrogee stood "in the shoes" of its Insureds, the *de facto* parties to the contract, was bound by the forum selection clauses just as its subrogors were. (*Id.*) Finally, BancoMex, although not party to the contracts, could avail itself of their provisions, including the

forum selection clauses, because it was being forced to defend against Albany's contract-based claims. The district court rejected the contention that Albany's claims did not arise from the contracts, noting that its complaint specifically pleaded a contract claim and that its tort claims equally required the trier to interpret the contracts. (App.20a-22a)

Second, the district court examined (a) the application of the forum selection clauses contained in the Bonos to the myriad contract and tort claims asserted by Albany, and (b) the enforceability of the clauses. Reading the clauses literally, the court noted that their reach extended to all matters related to the contracts. (App. 20a) Given that all of Albany's varied tort claims were contingent upon the interpretation of the contracts, the court found that each such claim also was subject to the forum selection clauses set forth in the Bonos. (App. 20a-22a)

Giving due weight to this Court's mandate that forum selection clauses in international transactions are presumptively valid (*M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17-18 (1972)), the court looked to whether enforcement of the clauses was unreasonable. (App. 18a-20a) In this connection, Albany challenged the integrity of the Mexican judicial system as an obstacle which, together with BancoMex's alleged influence in that judicial system, would preclude or significantly delay relief in the courts of Mexico. In the absence of any *facts* to support Albany's conclusory allegations, however ("[Albany] does not support its allegations of abuse and corruption" (App. 19a-20a)), the district court found that any potential delay engendered by suing in a foreign venue could neither hinder the application of otherwise valid forum selection clauses, nor render their enforcement "unreasonable." (*Id.*)

D. The Summary Order of the Circuit Court.

The circuit court reached the same conclusions. By summary, unpublished order, the circuit court rejected Albany's contentions that (a) the forum selection clauses did not apply to a suit arising from the Warehouse Receipts because the clauses appeared only in the Bonos, or loan notes, (b) the clauses were inapplicable because Albany's claims did not arise from the contracts between the Insureds and Somex, and (c) since BancoMex was not a party to either the Certificados or Bonos, it could not take advantage of the forum selection clauses. (App. 5a)

The circuit court noted that Albany's claim "that its suit does not relate to the subrogor's (sic) contract with Somex" was "belied by the fact that its complaint is replete with references to the [Warehouse Receipts]." (*Id.*) The court joined in the district court's observation that "the complaint places the receipts at the core of the dispute between the parties. . . ." (*Id.*) Reviewing the district court's determination that the two parts of the Warehouse Receipts "formed an integrated contract," the circuit court agreed. *Id.* The court noted that "Somex issued each loan note simultaneously with a warehouse receipt that had an identical identification number and that presentation of both a loan note and its corresponding receipt would . . . be necessary to obtain delivery of the [specified] goods. . . ." (App. 6a) Finally, with respect to the contention that BancoMex had no right to rely on the forum selection clauses because it issued neither the loan notes nor receipts, the circuit court "concur[red] in the district court's ruling that Albany 'may not use the contracts as a sword without also permitting [BancoMex's] use of the contracts' shields." (*Id.*) The circuit court concluded its analysis by stating, "[a]ccordingly, we conclude that the forum selection clause unambiguously encompasses Albany's suit." (*Id.*)

The circuit court next turned to the *enforceability* of the forum selection clauses. It rejected the contention that

enforcement would be "unreasonable and unjust," stating that it could not "extrapolate" from the "unfortunate instances" to which Albany pointed (a single, unrelated case in which a plaintiff *alleged* that BancoMex had engaged in inappropriate conduct in respect of the Mexican judicial system) to "wholesale rejection of Mexico as a forum." (App. 7a) Noting the "strong presumption in favor of the validity of international forum selection clauses (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*, 473 U.S. 614, 629 (1985)), and the "heavy burden" on the party objecting to such a clause (*New Moon Shipping Co. Ltd. v. Man B&W Diesel AG*, 121 F.3d 24, 32 (2d Cir. 1997)), the circuit court "agree[d] with the district court that Albany's burden has not been met in this case." (*Id.*)

Finally, the circuit court rejected Albany's contentions as to alleged "procedural improprieties." Specifically, the court held that the district court had not abused its discretion in "rel[ying] on new arguments . . . in a reply memorandum and . . . affidavit," in relying on allegedly improper or unauthenticated materials, and in refusing to grant Albany an opportunity to contest BancoMex's factual allegations through additional discovery or sur-reply papers. As to the first assertion, the circuit court noted that Albany's contention as to BancoMex's changing the ground of its argument "mischaracterizes the record." (App. 8a) As to the second argument, the circuit court noted that any reliance on inadmissible evidence was "harmless," and that Albany had failed to take appropriate steps in the district court to correct such deficiencies in any event. (*Id.*) As to the third argument, the circuit court simply found no abuse of discretion and noted that Albany had not, in any event, "identified any argument that it was prevented from making; . . . any . . . factual allegations that it could have, but was impeded from, rebutting; or any evidence that it was barred from introducing. . . ." (App. 10a) The circuit court affirmed, and entered judgment for BancoMex. Albany's subsequent petition for rehearing *en banc* was denied without dissent. (App. 26a-27a)

REASONS FOR DENYING THE WRIT

The petition's factbound claim that the courts below erred in enforcing the forum clauses does not warrant review by this Court. The decisions below were plainly correct applications of settled contract principles and federal procedural law. No serious conflict among the circuit courts or with a decision of this Court is urged in the petition. Nor is there any serious departure from the accepted and usual course of judicial proceedings that would warrant this Court's attention, or any important question of federal law that should be settled by this Court.

1. Since this Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), it has been axiomatic that courts must strictly enforce international forum selection clauses. They are prima facie valid; the party who seeks to avoid their application bears the heavy burden of establishing the existence of a highly compelling reason to override the agreement of the parties as to forum. *Id.* at 17-18. As this Court stated in *M/S Bremen*, international forum selection clauses must be enforced unless "trial in the contractual forum will be so gravely difficult and inconvenient that [the plaintiff] will for all practicable purposes be deprived of his day in court." *Id. See also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing forum selection clause). This case presents no reason either to reexamine or to depart from these well settled rules of civil procedure, rules that form an essential part of the system of international commerce and world trade.[1]

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[1] In appealing to xenophobic tendencies and narrow-minded parochialism (the decisions of the lower courts "deprived an *American* plaintiff of its day in its *own* court")(Petition at 9)(emphasis added), Albany would have this Court reverse not only *M/S Bremen*, but also thirty years of effective international adjudication of disputes arising in international commerce.

2. To the extent the petition argues that enforcement of the forum selection clauses would be "unreasonable and unjust" (App. 7a), or result in a deprivation of Albany's "day in court," that is a factual argument that has been twice rejected in this case by the courts below. Moreover, this factual argument is a mere assertion that the lower courts erred, not that there is any fundamental and important conflict in federal law that requires this Court's intervention. Stated otherwise, and even assuming that the lower courts were wrong (they were not), it is axiomatic that an error in the application of a settled rule alone does not bring this case within the ambit of Supreme Court Rule 10. As that rule states, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *see Hubbard v. United States*, 514 U.S. 695, 720 (1995) ("A high degree of selectivity is . . . enjoined upon us in exercising our certiorari jurisdiction. . . . [O]rdinarily a court of appeals decision interpreting one of our precedents — even one deemed to be arguably inconsistent with it — will not be reviewed unless it conflicts with the decision of another court of appeals.") (Rehnquist, C.J., dissenting).[2]

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[2] Albany cites *Argueta v. Banco Mexicano*, S.A., 87 F.3d 320 (9th Cir. 1996), for the proposition that it would be "unreasonable and unjust" to require Albany to bring its claims in Mexico. (Petition at 24-25) Plaintiff in *Argueta* resisted a forum selection clause which was invoked by the same proponent as in this case, contending that the Mexican criminal justice system, and BancoMex's predecessor's alleged influence in that system, put him in fear of unjust prosecution and incarceration if he returned to Mexico. He argued that it would therefore be unreasonable and unjust to require him to litigate his civil claims in Mexico. *Id.* at 326-27. The court *enforced* that forum selection clause over plaintiff's objection, and made no adjudication with respect to plaintiff's assertions as to BancoMex's alleged influence or improper conduct. Albany's reliance on the case is therefore entirely misplaced. *Id.* at 327.

3. Likewise, and contrary to Albany's arguments, the decision of the court of appeals does not "distort" or improperly "extend" the rule enunciated by this Court in *M/S Bremen* (Petition at 10, 19), or "sanction an unreasonable and unjust departure from the accepted and usual course of judicial proceedings . . . established in" *M/S Bremen* (*id.* at 10-11). The district court and court of appeals decisions were neither novel nor surprising. Drawing on clear precedent and settled principles, these courts merely applied the law to the facts in a manner wholly consistent with *M/S Bremen*. Albany asserts in this connection that application of the forum choice clauses to non-parties to the contract was improper. As the court of appeals held, and as we point out below (*see infra* at 11-12), it was not — this result was well supported by the facts and by settled contract law. (App. 10a) Albany cites *Carnival Cruise Lines* for the proposition that before that case was decided this Court had not "define[d] precisely the circumstances that would make it unreasonable for a court to enforce a forum clause." *Carnival Cruise Lines*, 499 U.S. at 591. (Petition at 14) While that limited proposition is true, it is also true that the *Carnival* court *did* "refine" (499 U.S. at 593) the principle enunciated by *M/S Bremen*. Thus, and contrary to Albany's assertion, there is no need for this Court to "further refine" (Petition at 14) that principle.[1] Nor is this case an appropriate vehicle for such an undertaking, even if it were desirable — no such "further refinement" is suggested on the facts of this case; no clear, overriding principle emerges from this case that could provide future guidance to the courts of appeals and

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[1] In enforcing a forum selection clause, the *Carnival* court underscored the fact that the inquiry is a highly particularized factual one, dependent on the circumstances. Other than its citation to an inapposite case (*see* fn. 2, *supra*), Albany has failed to present *facts* that would make it "unreasonable" to enforce the forum selection clauses.

district courts. In sum, this is a garden-variety case that has ended where it should, after appropriate appellate review.

4. Albany further asserts that the district court's failure to order an evidentiary hearing to resolve what Albany alludes to as factual disputes was error. (Petition at 12-13) Yet Albany never requested an evidentiary hearing in the district court, and only belatedly argued in the court of appeals that binding precedent entitled it to one. Equally, Albany never controverted the facts set forth in BancoMex's motion, and even in this Court has failed to identify (a) any factual dispute that required such a hearing or (b) any disputed fact that was resolved against it without such a hearing. Albany contends that in relying on alleged new matter first presented to the district court in BancoMex's reply papers, the district court erred and Albany was unfairly prejudiced. (*E.g.*, Petition at 15-16) But, as the court of appeals held, Albany was *not* prejudiced by such reliance, if any, and has failed, despite thorough appellate review in the court of appeals, to suggest any argument that it could have made in the district court, yet was prevented from making. (App. 10a)

5. Nor do the decisions of the district court and the circuit court enunciate any new or novel rule of law, much less one in conflict with any decision of this Court or the decision of any other circuit court of appeal. Specifically, and contrary to Albany's claim (Petition at 9), neither lower court established any "rule" that non-signatories to a contract are bound by international forum selection clauses. Rather, both lower court decisions are grounded in the language of the contract clauses at issue, are solidly linked to the *facts* of *this* case (and in particular to the fact that Albany chose to sue on contracts with forum selection clauses), and simply apply existing precedent (and in particular well settled contract law and this Court's decision in *M/S Bremen*) to those facts. In the case at bar, the non-signatory Albany was bound to the presumptively valid international forum selection clauses

because it sued under the very contracts that contained those clauses. It was thus fair to enforce the forum selection clauses against it, and would have been *unfair* to deny BancoMex the right to rely on them.[4] Even assuming that this conclusion was wrong (it is not), that does not bring this case within the certiorari jurisdiction of the Court.[5]

6. There is no conflict between the decision of the court of appeals in this case and the decision of this Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). *First Options* merely holds that a tribunal must look to the parties' contract in deciding whether a court or an arbitration panel should decide the question of arbitrability *vel non*. *Id.* at 943-44. More generally, *First Options* stands for the rather unremarkable proposition that when a controversy relates to the terms and interpretation of a contract, the court's inquiry must begin with,

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[4] The same principle is commonly applied to permit non-parties to contracts containing arbitration clauses to enforce such clauses when they are sued on those contracts. *See, e.g., Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993); *Hughes Masonry Co., Inc. v. Greater Clark County School Building Corp.*, 659 F.2d 836, 839 (7th Cir. 1981) ("In short, [plaintiff] cannot have it both ways. [I]t cannot rely on the contract when it works to its advantage, and repudiate it when it works to [its] disadvantage.").

[5] "[R]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10(a). (1989). Those reasons are limited to (i) a conflict among courts of appeals; (ii) a conflict between a state court of last resort and a circuit court; or (iii) an important question of federal law that should be settled by the Court. *Id.* It is axiomatic that review of factual determinations, such as those made here, is not ordinarily within this Court's certiorari jurisdiction.

and focus on, the language of that instrument as the best possible evidence of the parties' intent. Neither the particular adjudications of the circuit court in the instant case, nor its particular enunciation of pertinent contract law, are in conflict with *First Options*. To the contrary, in examining the constituent parts of the Warehouse Receipts, and in concluding that those parts form an integrated instrument, the circuit court here was giving effect to the general rules of contract construction reiterated by *First Options*.

7. Similarly, there is no conflict between the decision of the court of appeals in this case and the decision of the United States Court of Appeals for the Third Circuit in *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir.), *cert. denied*, 519 U.S. 1028 (1996).[6] *Dayhoff* concerned three separate contracts for the licensing, distribution, and sale of candy, entered into by four distinct signatories. *Id.* at 1289. Each contract was individually enforceable, and each contained a different forum selection clause. *Id.* When defendant Heinz terminated all of the contracts upon the sale of its candy business to Hershey, Dayhoff sued all signatories, as well as Hershey, for breach of contract in the Western District of Pennsylvania. *Id.* at 1290.

8. The court of appeals held that the parties to each agreement were required to litigate in their contractually chosen forum, and affirmed the dismissal of Dayhoff's claims as against signatories that had designated other fora in which to resolve their differences. *Id.* at 1303. In contrast, the circuit court allowed

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[6] The court of appeals' decision in this case is unpublished. Pursuant to Second Circuit Local Rule 0.23, such decisions "do not constitute formal opinions of the court and . . . shall not be cited or otherwise used in unrelated cases before this or any other court." Second Circuit Local Rule 0.23 As it cannot "be cited or otherwise used," the court of appeals decision cannot serve as one branch of a circuit conflict.

Dayhoff's claims against Hershey to proceed because Hershey's liability arose independently of the contracts (to which Hershey was not a party and with which it was not in privity, unlike Albany in the case at bar). Predicated on this holding, Albany asserts that because BancoMex was not a party to the Warehouse Receipts, it should not have been permitted to avail itself of the forum selection clauses in those instruments (Petition at 21), yet it overlooks the fact that *Albany* itself and BancoMex itself were essentially in privity with the parties to the contract, in the former case because Albany was subrogated to the rights of contract parties, and in the latter case because Albany sought to impose liability on BancoMex *under the contracts*. This explains why there is no conflict between any rule enunciated by *Dayhoff* and by the decision of the circuit court in the instant case. Of course, neither case enunciates any particularly novel or important rule of law, but more importantly, the rules they do rely upon are not inconsistent. Rather, both these cases merely apply the same settled contract law principles to forum selection clauses to reach their wholly unremarkable results.

9. Moreover, *Dayhoff* is inapposite to the case at bar. *First*, in the case at bar, neither constituent contract instrument alone imposes any duty upon Somex; both must be presented simultaneously to trigger any obligation. Unlike *Dayhoff*, the constituent contract parts here are not individually enforceable contracts with distinct parties, but are a single, integrated agreement. *Second*, the forum selection clauses contained in the Bonos ("the interested parties agree to submit to the tribunals of . . . Mexico") (App. 3a) create a category of beneficiaries that is inclusive of, but not limited to, the signatories to the contract. *Cf. In re Prudential Insurance Co.*, 133 F.3d 225, 229-30 (3d Cir. 1998)(distinguishing *Dayhoff* on basis that contracts there did not create a class of intended beneficiaries, other than actual signatories, who could avail themselves of the contractual forum selection clauses). *Third*, in seeking to curtail BancoMex's recourse

to the contract between its Insureds and Somex, Albany ignores its own complaint, which sought to impose contract liability upon BancoMex for the independent actions of its subsidiary, Somex. (App. 16a)*

10. Finally, Albany would have the Court conclude that because *Dayhoff* allegedly "declined to follow conflicting decisions of the Ninth" and other circuits (Petition at 21 n. 2), it somehow created an important circuit conflict that can and should be resolved by the grant of certiorari in *this* case. In fact, *Dayhoff* did no such thing. The court of appeals there merely adopted a narrow reading of the Ninth Circuit's opinion in *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988). It declined to follow *Manetti-Farrow* on the facts presented in *Dayhoff*, while still citing it for the general (and rather unremarkable) proposition that non-signatories may be bound by contractual forum selection clauses. *Dayhoff*, 86 F.3d at 1295. *Manetti-Farrow* does not propound a blanket rule in opposition to the decision of another circuit, and the Third Circuit did not cite it for such a general rule. Rather, it holds that a forum selection clause will govern claims asserted by a non-signatory only where those claims are closely related to the contractual provision at issue. *Manetti-Farrow*, 858 F.2d at 514. Thus, *Manetti-Farrow* lends further support to BancoMex's position by holding that the scope of a forum selection clause "depends on whether resolution of the claims relates to the interpretation of the contract." *Id.* The Ninth Circuit's reasoning in *Manetti-Farrow*, therefore, does not conflict with the Third Circuit's logic in *Dayhoff*, though the two courts

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* Albany equally ignores the fact that it shares BancoMex's non-signatory contract status; its claims are based on its status as subrogee. If the parties' entitlement to assert or defend claims based on the contracts is dependent upon signatory status, then Albany may not assert a contract claim. But Albany's very assertion of the contract claim belies this.

reached differing results based on the factual circumstances underlying each decision.

11. In short, there is no conflict on an important matter between any decision of this Court and the decision of the court of appeals below. There is no conflict on an important matter between decisions of the courts of appeals that is raised by this petition. And there is no challenge to any action of the lower courts in the nature of an assertion that they have "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." Sup. Ct. R. 10 (a). The petition at best seeks a further level of appellate factual review that is unavailable in this Court. This avenue of relief is foreclosed — Albany's remedy lies where it always did, in the Courts of Mexico.

* * *

CONCLUSION

For the reasons given above, the Court should deny the petition for a writ of certiorari.

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Respectfully submitted,

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